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No. 00-1853

IN THE

Supreme Court of the United States

AKOS SWIERKIEWICZ,

Petitioner,

v.

SOREMA, N.A.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENT

ANN ELIZABETH REESMAN
KATHERINE Y.K. CHEUNG
Counsel of Record
MCGUINESS NORRIS & WILLIAMS LLP
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600

Attorneys for *Amicus Curiae*
Equal Employment Advisory Council

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENT

The Equal Employment Advisory Council respectfully submits this brief as *amicus curiae*.[1] Letters of consent from all parties has been filed with the Court. The brief urges this Court to affirm the decision below, and thus supports the position of the Respondent Sorema, N.A.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council ("EEAC" or the "Council") is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 350 of the nation's largest private sector corporations, collectively employing over 20 million people

[1] Counsel for *amicus curiae* authored the brief in its entirety. No person or entity, other than the *amicus*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

throughout the United States. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives the Council a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's members are employers subject to Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e *et seq.*, the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, and other equal employment statutes and regulations. Collectively, EEAC's member companies routinely make and implement millions of employment decisions each year, including hires, promotions, transfers, disciplinary actions, terminations, and other employment actions. They devote extensive resources to training, awareness, and compliance programs designed to ensure that all of their employment actions comply with Title VII, the ADEA and other applicable legal requirements.

Nevertheless, each employment transaction is a potential subject of a discrimination charge and/or lawsuit. As employers, and as potential defendants to claims asserted under these laws, EEAC's members have a substantial interest in the issue presented in this case–*i.e.*, whether a complaint of national origin and age discrimination filed in federal court that does not contain enough facts to support the claim should be dismissed for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 12(b)(6).

EEAC seeks to assist this Court by highlighting the impact its decision may have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the attention of the Court relevant matters that the parties have

not raised. Because of its experience in these matters, EEAC is well situated to brief this Court on the concerns of the business community and the significance of this case to employers.

STATEMENT OF THE CASE

Respondent Sorema, N.A. (Sorema) is a reinsurance company. Joint Appendix (J.A.) 24a. Sorema hired Petitioner Akos Swierkiewicz in April, 1989 as Senior Vice President and Chief Underwriting Officer. *Id.* Swierkiewicz was born on July 25, 1946, *id.*, and was 43 years old at the time. *Id.* at 47a. His national origin is Hungarian. *Id.* at 24a.

In his amended complaint, Swierkiewicz states that approximately six years later, Francois Chavel, Sorema's President and Chief Executive Officer, shifted his job responsibilities from underwriting to marketing and assigned some underwriting duties to Nicholas Papadopoulo, a French national who was 32 years old at the time. *Id.* at 25a. Swierkiewicz alleges in his amended complaint that Mr. Chavel said that he wanted to "energize" the underwriting department when he made this change. *Id.* Although he characterizes the shift in duties as a "demotion," Swierkiewicz does not contend that it resulted in a change in his title or salary. *Id.* at 25a-26a.

According to the amended complaint, two years after the change in job duties had occurred, Swierkiewicz wrote a letter to Mr. Chavel in which he complained about his work environment. Swierkiewicz declared that he was going to leave the company, but only if he received a severance package of one year of paid leave, including all benefits. *Id.* at 34a-36a. Nowhere in the letter did Swierkiewicz mention his age or national origin or contend that his work environment was discriminatory. *Id.*

Two weeks later, Sorema informed Swierkiewicz that he could resign without a severance package or be terminated.

Swierkiewicz refused to resign and was therefore terminated on April 28, 1997. *Id.* at 27a. He claims that Sorema had "no valid basis to fire [him]" and that his "age and national origin were motivating factors in Sorema's decision to terminate his employment." *Id.* Swierkiewicz also alleges that Sorema provided generous severance packages to several other former employees, but did not indicate anyone else's national origin or age, or claim that they were similarly situated to him. *Id.*

The U.S. District Court for the Southern District of New York orally granted defendant's motion to dismiss the amended complaint. Counsel had agreed that the only allegedly adverse employment action at issue in the lawsuit was the April, 1997 termination. The district court ruled that Swierkiewicz's conclusory allegations that his discharge was the result of discrimination based on his age or national origin were "insufficient as a matter of law to raise an inference of discrimination." *Id.* at 40a.

On appeal, the U.S. Court of Appeals for the Second Circuit affirmed the decision. It agreed that Swierkiewicz's contention that his termination was motivated by national origin discrimination based simply on the fact that he is Hungarian and others at Sorema are French was insufficient as a matter of law to support an inference of discrimination. *Id.* at 48a. Likewise, the court concluded the comment that Sorema's president allegedly had made two years earlier about energizing the underwriting department was not enough to support a finding of age discrimination as a matter of law. *Id.* at 49a.

Swierkiewicz filed a petition with this Court for a writ of certiorari on the issue of whether an employment discrimination plaintiff must plead specific facts showing that he can make out a *prima facie* case of discrimination under *McDonnell Douglas Corporation v. Green*, 411 U.S. 792

(1973), or face dismissal for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 12(b)(6). The Court granted the petition.

SUMMARY OF ARGUMENT

Both the language of the Federal Rules of Civil Procedure and this Court's instruction to give the defendant fair notice of a claim require a pleader to include, at a minimum, enough facts in his complaint to show that he is entitled to recover. Federal Rules 8(a) and 12(b)(6) both require that a complaint recite more than a bare averment of the claim. Fed. R. Civ. P. 8(a) and 12(b)(6). Instead, this Court has held that a complaint must include enough information to give the defendant fair notice of the nature of the claim and its supporting grounds. *Conley v. Gibson*, 355 U.S. 41 (1957). Adequate notice is necessary to enable the defendant to investigate the cause of action effectively and prepare its defense.

Civil rights complaints must satisfy the same pleading standards that apply to other types of federal claims. Courts routinely require complaints that assert rights under other federal laws to contain enough facts to establish the basis for the claim. *See, e.g., Palda v. General Dynamics Corp.*, 47 F.3d 872 (7th Cir. 1995); *Estate Constr. Co. v. Miller & Smith Holding Co.*, 14 F.3d 213 (4th Cir. 1994). In considering a motion to dismiss, courts must grant all reasonable inferences in favor of the plaintiff. Courts should not assume, however, that plaintiffs can prove essential facts or allegations that they have not raised in their complaints. *Associated Gen. Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983). Requiring that a complaint include sufficient facts to support the claim is not burdensome. Moreover, a discrimination plaintiff typically has more information available to him before filing his complaint to meet this standard than individuals seeking relief under other federal laws.

Holding complaints to a lesser standard than the Second Circuit used would severely prejudice employers by forcing them to defend against frivolous discrimination lawsuits. Under the low threshold Swierkiewicz urges this Court to adopt, any plaintiff could file a bare statement that he or she was subject to discrimination and then use discovery as a fishing expedition to search for evidence of discrimination, even if there were no factual basis to support such a claim. Forcing employers to respond to discovery requests and engage in subsequent motions practice in unfounded suits would severely prejudice them by tying up valuable resources.

ARGUMENT

I. THE LANGUAGE OF THE FEDERAL RULES OF CIVIL PROCEDURE, TOGETHER WITH THIS COURT'S INSTRUCTION TO GIVE THE DEFENDANT FAIR NOTICE OF A CLAIM, REQUIRE A PLEADER TO INCLUDE, AT A MINIMUM, ENOUGH FACTS IN HIS COMPLAINT TO SHOW THAT HE IS ENTITLED TO RECOVER ON HIS CLAIM

A. Federal Rules of Civil Procedure 8(a) and 12(b)(6) Require That a Complaint Contain Enough Factual Information To Show the Pleader Is Entitled to Relief

Two provisions of the Federal Rules of Civil Procedure work together to establish the baseline standard for the contents of a complaint in federal court. Rule 8 is a general rule of pleading that applies to all claims for relief in all civil cases. Fed. R. Civ. P. 8(a).[2] It requires that a complaint contain (1) a short and plain statement of the grounds supporting the court's jurisdiction over the claim; and (2) a

[2] The only exception is for claims alleging fraud or mistake, which must be stated with particularity. *See* Fed. R. Civ. P. 9.

"a short and plain statement of the claim *showing that the pleader is entitled to relief*." Fed. R. Civ. P. 8(a) (emphasis added). Rule 12(b)(6) allows the court to dismiss a complaint that "fail[s] to state a claim *upon which relief can be granted*." Fed. R. Civ. P. 12(b)(6) (emphasis added).

The language in Rules 8(a) and 12(b)(6) is prescriptive. It does not merely require a plaintiff to state a claim, such as a blanket statement that Swierkiewicz's termination was based on his age and national origin. J.A. 27a. Instead, the Federal Rules require that a complaint contain enough essential facts to show that the plaintiff can prevail on his claim. The failure of Swierkiewicz's complaint to include this additional information thus warrants its dismissal.

B. A Complaint Is Insufficient if It Fails To Provide Fair Notice of a Claim and Its Basis

1. This Court has interpreted the Federal Rules to require that a complaint give the defendant fair notice of the claim and its supporting grounds

While not requiring a claimant to "set out in detail the facts upon which he bases his claim," this Court nevertheless held in *Conley v. Gibson*, 355 U.S. 41, 47 (1957), that the complaint must contain "'a short and plain statement of the claim' that . . . give[s] the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Id.* (footnote omitted). In that case, the petitioners alleged in their complaint that the railroad wrongfully discharged them and that the union failed to protect their jobs, unlike those held by non-minorities. This Court held that the complaint contained enough specific facts to support its general allegations of discrimination to withstand dismissal. *Id.*

In determining whether the allegations were enough to show that defendant had violated the law, the Court announced the rule that: "a complaint should not be dismissed

for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* at 45-46 (footnote omitted). If the plaintiffs could prove their factual allegations were true, they would show the union had breached its duty to represent members of the bargaining unit fairly and without discrimination.

The Court revisited the requirements of Rule 8(a) in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993), to resolve a conflict among the courts of appeals over whether courts could require a "heightened pleading standard" in civil rights cases against municipalities for alleged acts of local officials under 42 U.S.C. § 1983. Some courts had been requiring that this type of complaint set forth more facts in support of the claim than for pleading other causes of action. The Court rejected a higher standard as inconsistent with what it described as "the liberal system of 'notice pleading' set up by the Federal Rules." 507 U.S. at 168. Quoting *Conley*, the Court reiterated that the complaint only had to include enough information to give defendants "fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Id.* (internal quotations omitted).

The Court's observation in *Conley* and *Leatherman* that a plaintiff need not set forth the facts supporting his claim *in detail*, however, does not give a plaintiff license essentially to provide *no* facts to support his claim. A leading treatise on civil procedure explains: "Implicit in this passage [from *Conley v. Gibson*] is the notion that the rules do contemplate a statement of circumstances, occurrences, and events in support of the claim being presented . . . Rule 8(a)(2) does require that the pleader disclose adequate information concerning the basis of his claim for relief as distinguished from a bare averment that he wants relief and is entitled to it." 5 Charles Alan Wright and Arthur R. Miller, *Federal Practice and Procedure* § 1215 (2d ed. 1990 & Supp. 2001)

(footnote omitted). "[M]inimal requirements are not tantamount to nonexistent requirements. The threshold [for stating a claim] may be low, but it is real—and it is the plaintiff's burden to take the step which brings his case safely into the next phase of the litigation." *Gooley v. Mobil Oil Corp.* 851 F.2d 513, 514 (1st Cir. 1988).[3]

Opponents of this standard conveniently, but erroneously, characterize it as a return to "fact pleading." This label allows them to set up a straw figure to attack, since the modern Federal Rules of Civil Procedure embrace the concept of notice pleading and reject fact pleading. This argument, however, misses its mark, since requiring a complaint to contain essential facts to support a claim is not equivalent to instituting fact pleading. Instead, this information is necessary to put a defendant on notice of the plaintiff's claim and its basis, which is exactly what this Court mandated in *Conley* and is consistent with the Federal Rules. *See* 355 U.S. at 47; Fed. R. Civ. P. 8(a) and 12(b)(6).

2. Notice of a claim is not sufficient when the complaint merely states general conclusory allegations

Conclusory allegations that a plaintiff has experienced discrimination are not sufficient to give the defendant notice of the claim and its basis. The First Circuit, for example,

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[3] This Court's pronouncement in *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), that "the issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims," does not detract in any way from requiring that a plaintiff plead enough facts in the complaint to show he is entitled to relief. Likewise, the Court's ruling two years later in *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 283 n.11 (1976), that plaintiffs alleging racial discrimination did not have to "plead with 'particularity' the degree of similarity" between plaintiffs and their co-workers to establish a Title VII claim does not extinguish the responsibility to plead enough factual allegations to support a case.

refused to allow "bald assertions, periphrastic circumlocutions, unsubstantiated conclusions, or outright vituperation" to state a claim for relief in *Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49, 52 (1st Cir. 1990). In that case, a former employee alleged he had a constitutionally protected property interest in continued employment and was fired in violation of the First Amendment because of his association with a former judge who held political views at odds with the defendants. In affirming the dismissal of the plaintiff's complaint, the First Circuit emphasized:

> [m]erely juxtaposing a protected characteristic—someone else's politics—with the fact that plaintiff was treated unfairly is not enough to state a constitutional claim . . . What is needed is a fact-specific showing that a causal connection exists linking defendants' conduct, as manifested in the adverse employment decision, to plaintiff's politics, that is, the plaintiff must have pled facts adequate to raise a plausible inference that he was subjected to discrimination based on his political affiliation or views.

Id. at 58.

The First Circuit also dismissed a racial discrimination complaint in *Judge v. City of Lowell*, 160 F.3d 67 (1st Cir. 1998), that lacked any specific factual allegations to support a reasonable inference that racial bias, as opposed to some other non-discriminatory reason, motivated defendants' actions. Plaintiff's conclusory allegations that city officials had failed to notify her of her brother's death or to conduct a proper autopsy and homicide investigation because of her race were not enough to support her claim. Even taken as true, the court held that these errors did not "necessarily imply racial animus, and the mere conclusory allegation of such will not suffice." *Id.* at 77. Moreover, the court held that any rude and unprofessional conduct city officials may have exhibited towards plaintiff did not "creat[e] a reasonable

> inference that Judge's race—as opposed to other factors—was a motivating factor in defendants' alleged responses . . . [O]therwise, any unsatisfactory dealings between a public official and . . . [a person] falling into a protected category would give rise, prima facie, to a potential equal protection claim." *Id.*

The Seventh Circuit similarly dismissed a First Amendment retaliation complaint in *Kyle v. Morton High School*, 144 F.3d 448 (7th Cir. 1998), for failing to include enough facts to give defendant notice of the claim. The court held that "[f]or fair notice to be given, a complaint must at least include the *operative facts* upon which a plaintiff bases his claim." *Id.* at 455 (internal quotations and citations omitted) (emphasis added). This test asks whether "sufficient facts [have been] pleaded to allow the district court to understand the gravaman of the plaintiff's complaint." *Id.* (internal quotations and citation omitted). In *Kyle*, the plaintiff merely alleged that he was fired because of "'political and advocacy' reasons" without stating that he engaged in any protected speech or conduct for which his employer allegedly fired him. *Id.* at 454.

Likewise, Swierkiewicz's mere allegation that he was fired because of his national origin or age does not provide enough factual basis to give Sorema fair notice of the claim and its grounds. The Second Circuit thus properly dismissed his complaint.

3. Fair notice is necessary to enable the defendant to investigate and respond effectively to the cause of action

Allowing a complaint that merely alleges that the plaintiff was fired because of unlawful discrimination frustrates an employer's ability to investigate adequately and effectively address potential discrimination in the workplace. *See Kyle v. Morton High Sch.*, 144 F.3d at 455. If an employer does not

have enough information from the complaint to determine the basis for the claim, then it will not be able to identify relevant documentary evidence or witness testimony to review in order to evaluate the plaintiff's claim and promptly initiate remedial measures, if necessary.

This concern also arises in the context of the administrative investigation of discrimination complaints. Before an individual is entitled to institute a lawsuit, both Title VII, 42 U.S.C. § 2000e *et seq.*, and the ADEA, 29 U.S.C. § 621 *et seq.*, require him to file an administrative charge of discrimination with the Equal Employment Opportunity Commission (EEOC) within one hundred and eighty days after the allegedly discriminatory event, or three hundred days if a state or local enforcement agency exists with authority to grant or seek relief. 42 U.S.C. § 2000e-5(e). Title VII requires the EEOC to serve a "notice of the charge" upon a respondent employer that indicates the date, place and circumstances of the allegedly discriminatory employment practice. *Id.* The ADEA regulations require a charge to contain "[a] clear and concise statement of the facts, including pertinent dates, constituting the unlawful employment practice." 29 C.F.R. § 1626.8(a)(3).

The failure of a charge to include this information motivated Justice O'Connor to write separately in *EEOC v. Shell Oil Co.*, 466 U.S. 54, 82-95 (1984) (O'Connor, J., concurring in part and dissenting in part).[4] In that case, the charge merely alleged in a sweeping and conclusory fashion that Shell had failed to "recruit, hire, promote, train, assign or

[4] Justice O'Connor, joined by the Chief Justice, Justice Powell, and Justice Rehnquist, dissented on the specific factual question of whether the EEOC's notice of charge gave Shell sufficient notice of the alleged discrimination. Her views on the purpose of the EEOC's notice of charge, however, are consistent with that of the majority opinion.

select" African-Americans and females. *Id.* at 89. Justice O'Connor concluded it did not give Shell adequate notice of the alleged discrimination:

> a notice of charge adequately discloses the "date, place and circumstances of the alleged unlawful employment practice" only when it informs the respondent of the complainant's underlying reasons for filing the charge and is sufficient to permit a well-intentioned respondent to undertake immediate remedial measures if the charge is valid.

Id. at 91. Justice O'Connor went on to explain that this standard serves several purposes, including giving the employer fair notice of the allegations against it and increasing the likelihood that the agency investigation would proceed reasonably and fairly. *Id.* at 91-92.

Similarly, requiring that a complaint contain enough facts, beyond the mere allegation that a termination was discriminatory, puts the defendant on notice of the circumstances that support an inference of unlawful bias and promotes discovery targeted to the underlying cause of action. Otherwise, the defendant would not even know enough about the basis for the claim to determine whether a plaintiff's discovery request is overly broad or to draft focused discovery requests itself. Instead, an employer would have to conduct two stages of discovery–first to develop the basis for plaintiff's theory of discrimination and second to refute it. Allowing a conclusory complaint to expand the discovery process in this manner impermissibly broadens its scope, shifts the plaintiff's responsibility to state a claim upon which relief may be granted to the defendant, and thus is fundamentally unfair to defendants.

C. Civil Rights Complaints Should Be Held to the Same Pleading Standard as Other Types of Federal Claims

1. Courts routinely require that complaints for federal claims other than civil rights contain enough facts to establish the basis for the claim

The Supreme Court's ruling in *Leatherman* that civil rights cases do not deserve a higher pleading standard than other types of federal claims does not support imposing a more lenient standard on them either. *See* 507 U.S. at 168. The Second Circuit correctly used the same standard to evaluate the sufficiency of Swierkiewicz's employment discrimination complaint as courts have used to judge other types of federal complaints.

Courts have required that complaints alleging violations of antitrust laws, for example, include enough facts to support each component of a claim in order to withstand a motion to dismiss under Rule 12(b)(6). The Fourth Circuit affirmed the dismissal of a complaint that did not contain sufficient facts addressing all of the required elements of an antitrust claim in *Estate Construction Co. v. Miller & Smith Holding Co.*, 14 F.3d 213 (4th Cir. 1994). The court held that "[a] mere allegation that 'the defendants violated the antitrust laws as to a particular plaintiff and commodity' is insufficient to survive a Rule 12(b)(6) motion." 14 F.3d at 221 (citation omitted). *See also Aquatherm Indus. v. Florida Power & Light Co.*, 971 F. Supp. 1419, 1424 (M.D. Fla. 1997) ("'plaintiff must plead sufficient facts so that each element of the alleged antitrust violation can be identified.' . . . Conclusory allegations 'will not survive a motion to dismiss if not supported by facts constituting a legitimate claim for relief . . . .'") (citations omitted), *aff'd*, 145 F.3d 1258 (11th Cir. 1998), *cert. denied*, 526 U.S. 1050 (1999).

Using the same rationale, the Seventh Circuit affirmed the dismissal of a breach of contract claim in *Palda v. General Dynamics Corporation*, 47 F.3d 872 (7th Cir. 1995). In that case, the court set forth the necessary elements for plaintiff's breach of contract claim and held that his failure to plead sufficient facts to support one of these elements made his complaint deficient. *Id.* at 874-75. The court concluded that "[a] complaint which consists of conclusory allegations unsupported by factual assertions fails even the liberal standard of Rule 12(b)(6)." *Id.* at 875 (citations omitted).

Requiring that a complaint contain enough facts to support the claim asserted does not mean the complaint must be lengthy or detailed. Form 9 in the Federal Rules of Civil Procedure contains enough facts in three sentences to support the plaintiff's claim for negligence. Fed. R. Civ. P., Appendix of Forms, Form 9. The complaint states that the defendant drove a car against the plaintiff and describes the plaintiff's injury. *Id.* Implicit in the description of the incident is the existence of a duty not to hit pedestrians while driving, a breach of that duty, and injury. Therefore, the complaint contains factual assertions to support each element of a negligence claim.

In contrast, Swierkiewicz's complaint merely alleges that he was terminated from his job and that "no valid basis" existed for his discharge. J.A. 27a. These allegations alone, however, do not reasonably lead to the conclusion that the event was due to discrimination based on his age or national origin. Sorema could have had a number of lawful reasons for firing Swierkiewicz. Or, alternatively, it could have fired Swierkiewicz for no reason without violating either Title VII or the ADEA. In contrast, a defendant driving a car generally will not have a lawful reason for striking a pedestrian crossing the street.

2. Courts should not assume that plaintiffs can prove facts or assertions that they have not alleged in their complaints in ruling on a motion to dismiss

In ruling on a motion to dismiss, courts must construe the complaint in the light most favorable to the plaintiff and draw all *reasonable* inferences from the allegations in his favor. "However, the court will not accept conclusory allegations concerning the legal effect of the events plaintiff has set out if these allegations do not reasonably follow from his description of what happened." 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357 (2d ed. 1990 & Supp. 2001). "[M]ore detail often is required than the bald statement by plaintiff that he has a valid claim of some type against defendant . . . [I]f the allegations in the complaint, taken as true, do not effectively state a claim, the added assertion by plaintiff that they do state a claim will not save the complaint." *Id.*

This Court cautioned lower courts against engaging in precisely this type of speculation in *Associated General Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983). In that case, the Court held that a complaint that failed to allege sufficiently that the defendant's antitrust violations had injured plaintiffs should be dismissed. The Court explained that even if the defendant's conduct had been unlawful, "[i]t is not . . . proper to assume that the [plaintiff] can prove facts that it has not alleged or that the defendants have violated the . . . laws in ways that have not been alleged." *Id.* at 526 (footnote omitted).

Adhering to this Court's instructions, the Sixth Circuit affirmed the dismissal of a police chief's discrimination complaint in *Jackson v. City of Columbus*, 194 F.3d 737 (6th Cir. 1999). In that case, plaintiff alleged that he was discriminated against based on his race when his employer instructed him not to discuss a pending investigation for

misconduct and barred him from his office and city facilities. While plaintiff alleged that he was treated differently than similarly situated nonprotected employees, the court nevertheless dismissed the action because the complaint did not contain any facts to support this bare allegation. "His statement that to his knowledge no other Columbus official or citizen has ever been subjected to a gag or banishment order is insufficient . . . Plaintiff must allege facts showing that non-minority employees who were similarly situated in all respects were treated differently . . . , not simply that plaintiff's circumstances were unique." *Id.* at 752 (internal quotations omitted).

The First Circuit explained in *Correa-Martinez* that although Rule 12(b)(6) requires courts to accept the allegations in a complaint as true and to draw all reasonable inferences from them, it "does not entitle a plaintiff to rest on 'subjective characterizations' or conclusory descriptions of 'a general scenario which could be dominated by unpleaded facts.'" 903 F.2d at 53 (citation omitted). In other words, "[courts] are not obligated to give free rein to imagination, . . . conjure up unpled allegations or . . . credit every conceivable inference." *Id.* at 58 (internal quotations and citations omitted). Therefore, the Second Circuit properly did not need to assume in this case that the former employees who allegedly received severance packages were similarly situated to Swierkiewicz or had a different national origin or age.

3. Requiring that a complaint include sufficient facts to support the claim is not burdensome

To require a pleader to include enough facts in his complaint to show that he is entitled to relief is not burdensome. Although the Second Circuit refers to the *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973), test for establishing a *prima facie* case of discrimination, it did not impose this standard for providing evidence

at trial onto the pleading stage. Requiring that a complaint include essential facts to support a claim is not equivalent to requiring proof that the facts are true at this stage.[5] To survive dismissal, a plaintiff only needs to allege enough facts that, to the best of his knowledge, information and belief, are true to support his entitlement to relief. Rule 11 of the Federal Rules of Civil Procedure, which provides sanctions for, *inter alia*, filing a complaint that lacks evidentiary support, requires only a reasonable inquiry under the circumstances before the plaintiff makes this affirmation. Fed. R. Civ. P. 11(b). But to dispense even with this minimal requirement and allow a pleader to allege merely that his termination was discriminatory, without any facts to support this claim, would render Rule 11 useless.

In this case, the bulk of Swierkiewicz's complaint focuses on a shift in job duties in 1995, not his termination two years later. Swierkiewicz did not file a timely charge with the EEOC over this transfer, however, as Title VII requires before he may file a lawsuit in federal court. 42 U.S.C. § 2000e-5. His lawsuit therefore challenged only his discharge, to which his complaint devoted a scant handful of paragraphs.

4. A discrimination plaintiff typically has enough information available to him before filing his lawsuit to enable him to include essential facts in his complaint to show he is entitled to relief

Petitioner and his *amici* complain that requiring a plaintiff to allege enough facts in his complaint to support his claim

[5] Moreover, this Court described the burden of establishing a *prima facie* case of disparate treatment as "not onerous." *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981). The Second Circuit's standard of requiring that a complaint simply allege enough facts to support a claim of discrimination through direct or circumstantial evidence is similarly undemanding and should be affirmed.

puts an unfair burden on him before discovery, because the employer is in control of the supporting facts. A discrimination plaintiff does not file suit in federal court, however, in a vacuum.

As part of its mandate to enforce Title VII and the ADEA, the EEOC has authority to investigate and conciliate allegations of unlawful conduct. 42 U.S.C. § 2000e-5; *see also* Section I.B.3, *supra* at 12. The agency has a variety of ways to gather information during an investigation, including inspecting the employer's premises, interviewing the charging party, the respondent, and their witnesses, requiring written statements from the parties, and requesting data, including interrogatories, employment records, and other documentary evidence. 29 C.F.R. §§ 1601.15 and 1626.15. The EEOC may issue subpoenas to acquire relevant documents or testimony. 29 C.F.R. §§ 1601.16 and 1626.16.

The regulations explicitly authorize the EEOC to disclose this information to both the complainant and respondent, or their attorneys, "where disclosure is deemed necessary for securing appropriate relief." 29 C.F.R. § 1601.22. Thus, a plaintiff may benefit from discovery the EEOC has conducted into his allegations to prepare his employment discrimination complaint, without even having to pay for it.

In addition, several states have laws giving current and former employees the right to inspect their own personnel files. *See, e.g.*, Conn. Gen. Stat. § 31-128b; Mich. Comp. Laws § 423.503. These files generally contain information used by the employer to make decisions regarding employment, promotion, compensation, termination or disciplinary matters and thus may provide relevant facts to include in a discrimination complaint to support plaintiff's allegations.

Discrimination plaintiffs thus typically have sufficient information available to them from a variety of sources to be able to include in their complaint enough facts that, if proved, would show that defendant acted unlawfully. In fact,

Swierkiewicz had *more* access to relevant information to include in his complaint than most other plaintiffs suing in federal court. His failure to do so thus warrants dismissal of his complaint.

Title VII and the ADEA both allow an individual to file suit in court before the EEOC has completed its investigation under certain circumstances. Under Title VII, an individual may request a right to sue letter from the EEOC 180 days after he filed a charge. 42 U.S.C. § 2000e-5(f)(1); 29 C.F.R. § 1601.28. The ADEA permits an individual to file a civil action 60 days after filing a discrimination charge with the EEOC. 29 U.S.C. § 626(d). This Court, however, should not reward an individual who declines to participate in the agency's investigation and conciliation efforts by allowing him to bypass a pleading requirement that applies to all federal claims.

III. HOLDING COMPLAINTS TO A LESSER STANDARD THAN THE SECOND CIRCUIT USED WOULD SEVERELY PREJUDICE EMPLOYERS BY ALLOWING INDIVIDUALS TO FILE FRIVOLOUS DISCRIMINATION LAWSUITS THAT SUBJECT DEFENDANTS TO TIME-CONSUMING AND COSTLY LITIGATION

A. Reversing the Second Circuit's Decision Below Would Encourage Complaints That Abuse the Judicial System

Swierkiewicz complains that the dismissal of his complaint deprived him of "the chance to discover Sorema's reason for his employment termination; or why it was abrupt; or who made the decision; or the identity, age and national origin of his replacement; or how Sorema treated other terminated employees." Petitioner's brief, at 22. His contention, however, reflects a fundamental misunderstanding of the purpose

of the judicial system. A lawsuit must be the result of at least a limited investigation into an adverse employment action that reveals some circumstance supporting a reasonable inference of discriminatory bias. *See* Fed. R. Civ. P. 11. It should not be the first step a party takes after experiencing an allegedly adverse action to *determine* whether the action was discriminatory, as Swierkiewicz envisions. Discovery is a privilege conditioned on presenting a sufficient complaint, not an automatic right.

Swierkiewicz's inability to pinpoint a reason for his termination does not mean it must have been—or even probably was—because of unlawful discrimination. His allegation that "Sorema had no valid basis to fire [him]," J.A. at 27a, is irrelevant, since nowhere does he allege that Sorema *needed* a valid reason to fire him. Therefore, the absence of a "valid" reason for his termination does not reasonably support any inference of a discriminatory motive.

Rule 12(b)(6) serves an important function in enabling the judicial branch to monitor lawsuits to ensure that they present legal theories that are grounded both legally and factually. This Court has not been hesitant to dismiss complaints that fail to satisfy this standard in the past. In *Neitzke v. Williams*, 490 U.S. 319, 326-27 (1989), it characterized the function of Rule 12(b)(6) as "streamlin[ing] litigation by dispensing with needless discovery and factfinding."

The scenario Swierkiewicz proposes essentially invites employees to file a discrimination lawsuit in federal court every time they experience an employment action they think is unfair. Many of these cases likely will be unfounded, since people would rather believe an adverse employment action is the result of discrimination rather than their own shortcomings. Title VII, however, only gives individuals a cause of action to challenge employment actions they can show were based on a protected characteristic.

In fact, employees often ask courts to review ordinary employment actions that they think are unfair, a role courts consistently have refused. Courts have said repeatedly that their function is not to sit as a "super-personnel" department to reexamine personnel decisions an employer makes during the course of business. *See, e.g., Kendrick v. Penske Transp. Servs.*, 220 F.3d 1220, 1233 (10th Cir. 2000); *Rodriguez-Cuervos v. Wal-Mart Stores, Inc.*, 181 F.3d 15, 21-22 (1st Cir. 1999); *Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1136 (8th Cir.), *cert. denied*, 528 U.S. 818 (1999); *Foster v. Arthur Andersen, LLP*, 168 F.3d 1029, 1035 (7th Cir. 1999); *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991). Yet, Swierkiewicz asks the court to undertake precisely this role by filing a complaint full only of conclusory allegations.

B. Forcing Employers To Defend or Settle Complaints That Satisfy a Lower Threshold Than the Second Circuit Used Would Severely Harm Them

Calling litigation today "too expensive a process to waste time on fanciful claims," the Third Circuit recognized the difficulties created by allowing complaints to proceed past dismissal even though they do not plead enough facts to support the claim. *Pennsylvania ex rel. Zimmerman v. Pepsico, Inc.*, 836 F.2d 173, 182 (3d Cir. 1988). The Seventh Circuit explained this problem in more detail in an antitrust case: "When the requisite elements are lacking, the costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint." *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984).

The same concerns of subjecting defendants to the time-consuming and costly machinery of federal litigation based solely on conclusory and speculative allegations apply with equal force to employment discrimination cases. Holding complaints to a lesser standard than the Second Circuit used would allow each individual who feels adversely affected by one of the millions of employment decisions that EEAC's member companies routinely make and implement each year to file a discrimination claim based on no more than a conclusory allegation that discrimination motivated the decision. This scenario would force employers to defend against potentially millions of employment discrimination lawsuits each year. While defending against some lawsuits, standing alone, probably would not strain an employer's operations, a number of lawsuits in the aggregate may well have that effect.

Moreover, defending a company against even a simple employment discrimination lawsuit today has become so time-consuming and expensive, with uncertain outcomes, that many employers opt to settle cases instead of litigating them. This decision occurs even if the claims do not have much merit. Setting a standard for discrimination complaints that is lower than the one the Second Circuit used is sure to create a surge in employment discrimination lawsuits that will impact settlements.

Statistics from the federal judicial system show that an overwhelming proportion of plaintiffs do not have enough evidence to support their employment discrimination cases. From October 1, 1999 to September 30, 2000, for example, plaintiffs filed 21,032 employment discrimination cases in federal court. Judicial Business of the United States Courts 2000, Table C-2A (Admin. Office of U.S. Courts, Oct. 1, 1999–Sept. 30, 2000). During the same period, the courts concluded 19,968 cases. *Id.* at Table C-4. Of the terminated

cases, over 60% were cases the courts closed before even holding a pretrial conference. Only 4.8% of the cases that finished during that period even reached trial.[6]

Terminating a case prior to trial usually means the decision was in favor of the defendant. Relaxing the standard for dismissal from the Second Circuit's position thus would increase greatly the number of claims defendants must confront in court. Once they pass the low threshold Swierkiewicz advocates as sufficient to survive dismissal, the sheer volume of plaintiffs' lawsuits essentially will force employers to capitulate to their demands for a quick settlement. Reversing the decision below thus may even jeopardize an employer's entire operations.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

ANN ELIZABETH REESMAN
KATHERINE Y.K. CHEUNG
Counsel of Record
MCGUINESS NORRIS & WILLIAMS LLP
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600

Attorneys for *Amicus Curiae*
Equal Employment Advisory Council

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[6] These percentages of employment discrimination cases concluded before trial are consistent with previous years. *See* Judicial Business of the United States Courts 1997-1999, Tables C-4 (Admin. Office of U.S. Courts, Oct. 1, 1996–Sept. 30, 1999).